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In the
# Supreme Court of the United States

OCTOBER TERM, 1968
No. 203

WILLIAM E. THORESEN, III
PETITIONER
*v.*
STATE OF MAINE
RESPONDENT

## BRIEF IN OPPOSITION

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## APPENDIX


Appendix A. Opinion by United States Court of Appeals for the First Circuit on Application for Certificate of Probable Cause ..... 7

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## BRIEF IN OPPOSITION

## QUESTIONS PRESENTED

1. Does the Federal Constitution require a state to entertain a 'federal constitutional question' which two Federal District Courts have refused to entertain for lack of jurisdiction?

2. Does the Federal Constitution forbid a state legislature from enacting jurisdictional provisions in a habeas corpus statute, which provisions are synonymous with those in the Federal habeas corpus statute?

## STATEMENT OF THE CASE

In 1959, petitioner was arrested and charged with larceny of pictures. Counsel was employed by the petitioner in the case. After consultation with counsel, petitioner elected to petition for information proceedings; and he subsequently pleaded guilty to an infor-

mation charging him with the larceny of six pictures "all in the aggregate value of one hundred fifty dollars". He was thereafter sentenced as for a felony; but the sentence was suspended and petitioner was placed on probation for two years. In 1961, petitioner's probation was terminated after its terms had been properly followed.

In 1967, six years after the completion of the service of the probation, and after having been indicted in the Federal District Court in California for an alleged violation of 15 U.S.C. § 902 (e) (interstate shipment of firearms by a felon), petitioner instituted a state post-conviction petition claiming that the pictures were not valued over one hundred dollars, and that he did not understand that he was pleading guilty to a felony per the 1959 state court proceedings. His collateral attack of the conviction was brought under 14 M.R.S.A. § 5501, et seq., which provided that the action was available to:

> "Any person convicted of a crime and incarcerated thereunder including any person committed as a juvenile offender, or released on probation, or paroled from a sentence thereof, or fined * * *."

The Maine Supreme Judicial Court, in *Thoresen v. State*, 239 A. 2d 654 (1968), held that because the petitioner was not involved with "either a presently existing actual or physical restraint or a technical hold or restraint" (probation or parole), the petition did not confer jurisdiction on the court to adjudicate the merits of the case.

Petitioner's subsequent applications for Writs of Habeas Corpus in the Maine Federal District Court and in the Federal District Court for the Northern District of California were dismissed because of a lack of jurisdiction.*

*The United States Court of Appeals, First Circuit, denied a certificate of probable cause on May 13, 1968, with an addendum on May 24, 1968. The Opinion denying the petitioner's application for the certificate is attached as Appendix A hereto.

## ARGUMENT

### I.

### THE DECISION BELOW IS CORRECT.

A. *Maine Provides an Adequate Post-Conviction Process for Determining Federal Constitutional Violations.*

This is not a case where Maine has failed to enact an "adequate corrective process for the hearing and determination of claims of violation of Federal Constitutional guarantees". *Case v. Nebraska*, 381 U.S. 336, 14 L.Ed. 2d 422, 85 S. Ct. 1486 (1965). Maine's post-conviction statute, 14 M.R.S.A. § 5501, et seq., received favorable mention in *Case v. Nebraska*, supra, note #3, p. 338, 345.

B. *Because the State Court Decision Turned Upon a Question of State Jurisdiction, No Federal Issue is Presented.*

The State Court decision involved here turned upon a question of state jurisdiction; and the decision is controlled by a state statute regarding Maine's habeas corpus statute. In effect, the petitioner is asking this Court to strike down state legislation per state court jurisdiction, even though two Federal District Courts have declined to entertain this case on the basis of a lack of federal jurisdiction.* Surely, a state court is not to be held to a position superior to that of federal courts regarding an alleged 'federal question'.

There is certainly no conflict here between the Maine Court and the Federal District Courts of California and Maine; the decisions of all three Courts are rested upon nearly identical jurisdictional grounds. *Ahrens v. Clark*, 335 U.S. 188; *Thoresen v. State*, 239 A. 2d 654.

*Too, the Courts of Appeals for the First and Ninth Circuits denied certificates of probable cause. Misc. No. 263 and Case No. 22919, respectively.

C. *The Cases Cited by the Petitioner Are Not Authority for the Granting of the Writ.*

The cases of *Foster v. Illinois*, 332 U.S. 134, *Young v. Kagen*, 337 U.S. 235, 93 L.Ed. 1333, 69 S. Ct. 1073, and *New York ex rel. Whitman v. Wilson*, 318 U.S. 688, 87 L.Ed. 1083, 63 S. Ct. 840, cited by the petitioner (as well as other cases cited at page 6 of the petition) are not applicable because Maine does possess an adequate corrective post-conviction process. 14 M.R.S.A. § 5501, et seq.

The remaining cases cited in the petition are distinguishable from the instant case. *United States v. Morgan*, 346 U.S. 502 was not a habeas corpus case; but a federal coram nobis proceeding. Even at that, the case noted the presence of *United States v. Lavelle*, 194 F.2d 202, as constituting controlling authority for refusal to entertain a case where the petitioner was not then in custody. In both *Fiswick v. United States*, 329 U.S. 211, 91 L.Ed. 196, 67 S. Ct. 224, and *Carafas v. LaVallee*, —U.S.—, 36 L. W. 4409 (May 20, 1968), the petitioners had "standing" when they commenced their actions, i.e., they were then in custody. Their subsequent discharges from imposed sentences did not divest the Federal District Courts from jurisdiction. Here, the petitioner commenced the state habeas corpus proceeding six years after the date of discharge from the sentence. The case of *Ginsberg v. New York*, —U.S.—, 20 L. Ed. 2d 195, is not applicable because Maine is not imposing any penalties upon petitioner whatsoever. *Tannenbaum v. New York*, 338 U.S. 439, 18 L. Ed. 2d 1300, 87 S. Ct. 2107, and *Jacobs v. New York*, 388 U. S. 431, 18 L. Ed. 2d 1294, 87 S. Ct. 2098.

D. *Petitioner is Not Without an Adequate Federal Remedy at Law.*

Trial of the petitioner in Fresno, California, on the federal indictment [charging the shipping of firearms in interstate commerce by a person who has been convicted of a crime punishable by imprisonment for more than one year - 15 U.S.C. § 902 (e)] is set for June 24,

1968. Part of the government's case bears upon proof that petitioner has previously been properly convicted of a felony in Maine. Petitioner's remedy at law is found in *Burgett v. Texas*, 389 U.S. 109.

## CONCLUSION

Maine does possess adequate corrective process for hearing and determining claims of Federal Constitutional guarantees under its habeas corpus statute; but that process does have jurisdictional limits like those of federal habeas corpus. The State Court's decision declining to entertain the petition because the petitioner was not in custody when the petition was filed (and, therefore, the state court had no jurisdiction), is in accord with the positions of Federal District Courts in California and Maine who have also declined to take jurisdiction of this case. *Ahrens v. Clark*, supra; *Tannenbaum v. New York*, supra; and *Jacobs v. New York*, supra.

Petitioner has an adequate remedy at law in the trial of the pending federal indictment because the government is required to prove that the petitioner has previously been correctly convicted of a felony in Maine. *Burgett v. Texas*, supra.

Respectfully submitted,

JOHN W. BENOIT, JR.
Assistant Attorney General
Attorney for Respondent

July, 1968

## Appendix A

# United States Court of Appeals

## For the First Circuit

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Misc. No. 263.

In the Matter of
WILLIAM E. THORESEN, III,
PETITIONER.

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OPINION ON APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

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Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

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*Gene Carter, John P. Frank, John J. Flynn, Eliot Feldman, Rudman, Rudman, & Carter* and *Lewis, Roca, Beauchamp & Linton* on application for petitioner.

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May 13, 1968.

ALDRICH, *Chief Judge*. This is a request for a certificate of probable cause for appeal from an order of the District Court for the District of Maine dismissing an application for a writ of habeas corpus for lack of jurisdiction. A somewhat detailed recitation of facts is called for.

In September 1959, when petitioner was 21 years old, he stole six posters from the Bar Harbor, Maine, terminal of the Canadian National Railway's Nova Scotia ferry. He was apprehended and jailed for want of bail. Thereafter he waived indictment. The waiver which he executed recited that he was charged with "[l]arceny of goods having a value in excess of One hundred dollars." On the same day he pleaded guilty to an information in which the posters were assigned

individual values, totalling an "aggregate value of one hundred and fifty dollars." Between the date of his apprehension and the date of his plea, a period of some ten days, petitioner was continuously in jail. According to affidavits accompanying the present application the following events occurred.

Petitioner employed an attorney, who in turn made contact with petitioner's father. Upon his arrival the father essentially discharged the attorney and conducted lengthy negotiations with the district attorney in the absence of counsel. The father brought with him funds sufficient to bail petitioner, but did not bail him. He informed the district attorney that he was worried about petitioner and thought that he should be treated in a mental institution; that he did not want the petitioner to know that this was the father's proposal, and that he did not want petitioner fined, but thought it best that he receive a suspended sentence and probation, as a result of which, if petitioner was released forthwith, he could return to his home in Illinois for treatment, but be under the custody of the court. After some difficulty the petitioner's father and the district attorney persuaded petitioner to plead guilty, the father informing petitioner that everything would be all right, and that he was only pleading to a "misdemeanor type" offense. Thereafter petitioner pleaded guilty, as aforesaid. He received a two-year suspended sentence, and in 1961 was discharged from the terms of his probation.

Petitioner is presently a resident of California. In 1967 he was indicted in the United States District Court in California for transporting firearms in interstate commerce having been previously "convicted of a crime punishable by imprisonment for a term exceeding one year." 15 U.S.C. § 902(e). The prior conviction relied upon is that just described. Investigation by petitioner's counsel revealed the foregoing facts, and revealed, further, that the Canadian National Railway had paid a small sum for the posters in question, $2.25 apiece for five and some $15 for the sixth, from which

it could fairly be said that by no possibility was the stolen property of a value in excess of $100. Accordingly, the larceny to which petitioner had pleaded should not have been so described, and petitioner was not in fact guilty of an offense within the ambit of section 902(e).[1]

On this basis petitioner sought postconviction relief in the State of Maine. The Maine Supreme Judicial Court dismissed for lack of jurisdiction, holding that the only relief open in that state is under its habeas corpus statute; that habeas corpus is not available when the petitioner is no longer in custody, and that no greater rights attached to the petitioner, so far as the Maine courts were concerned, by virtue of the California proceedings. The present application was then filed in the district court, and dismissed for want of jurisdiction. The district court having declined to issue a certificate of probable cause for appeal, our sole present question is whether that declination was proper.

Petitioner's difficulty is his inability to demonstrate the "custody" required by 28 U.S.C. § 2241(c) before the writ of habeas corpus can issue, a problem pointed up by his failure to name a respondent against whom the writ is to issue. We do not have merely the situation which moved a minority of the Court in *Parker v. Ellis*, 1960, 362 U.S. 574, 577 and 595 (dissenting opinions), where custody terminated during the pendency of the action, see, also, *Thomas v. Cunningham*, 4 Cir., 1964, 335 F.2d 67; here there was no custody—at least so far as Maine was concerned—when the application was filed. Apparently petitioner believes that he is contesting a state interest in the light of the fact that he seeks a certificate of probable cause under 28 U.S.C. § 2253. Yet the absence of any respondent has the serious legal consequence that there was no controversy, and the serious practical effect that there was no one to contest.

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[1]Conviction for larceny of goods whose value is less than $100 carries a maximum term of six months. Me. Rev. Stat. Ann. tit. 17, § 2101.

Petitioner also asserts the custody of the United States in connection with the proceedings pending against him in California.[2] Assuming that this be sufficient custody, *but cf. Allen v. United States*, 1 Cir., 1965, 349 F.2d 362, jurisdiction would not lie in the District of Maine. *Ahrens v. Clark*, 1948, 335 U.S. 188. While we suggest no opinion on the question, even if, as petitioner asserts, there should be nowhere that he may now seek a writ of habeas corpus, it does not necessarily follow that he is remediless so far as defending against the California indictment is concerned. *Cf. Burgett v. Texas*, 1967, 389 U.S. 109. We, of course, express no views as to the applicability of *Burgett*, or whether on the facts alleged petitioner was unconstitutionally convicted.

*Certificate denied.*

May 24, 1968.

PER CURIAM. On May 20 the Supreme Court overruled *Parker v. Ellis*, 1960, 362 U.S. 574, in *Carafas v. Lavallee*, 5/20/68, and decided *Peyton v. Rowe*, 5/20/68. We have reviewed these decisions and see no reason to alter ours.

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[2] Petitioner urges that he is in a unique position under the statute as his federal custody by virtue of the indictment against him arguably places him "'in custody pursuant to the judgment of the state court' [28 U.S.C. § 2254] since the federal indictment is based upon a 1959 Maine conviction." We do not believe that this novel suggestion as to the meaning of "pursuant to" advances his case.